

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA

Plaintiff

V.

DAVID VEGA MOLINA

Defendant

CRIMINAL NO. 99-295 (DRD)

REPORT AND RECOMMENDATION

Defendant's *Motion to Dismiss Count IV of the Indictment* (Docket No. 526) must be granted without prejudice on *ex post facto* grounds pursuant to the First Circuit's opinion on appeal. See United States v. Vega Molina, 407 F. 3d 511, 524-526 (1st Cir. 2005), pet. for cert. filed on August 16, 2005. In its opinion, the Court of Appeals held that the penalty provision at issue — 18 U.S.C. § 1203(a) — was nonexistent at the time defendant committed the offense.

Notwithstanding this ruling, the Government may move to amend the indictment to charge a Section 371 conspiracy or a direct violation of Section 1203. See Vega Molina, supra at 526. More so, as the Circuit recognized, “the appellant’[s] inattentiveness [in not raising the issue until direct appeal] should not redound to [his] benefit”.

The Court **RECOMMENDS** that the Government be given twenty (20) days to decide whether to correct the indictment in regards to Count IV.

The Government's reply (Docket No. 528) and defendants' response (Docket No. 529) have been duly **NOTED** and considered by the Court.

Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of the Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further

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2 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111(1986);
3 Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992).

4 **SO RECOMMENDED.**

5 In San Juan, Puerto Rico, this 28th day of September, 2005.

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7 *S/Gustavo A. Gelpi*

8 **GUSTAVO A. GELPI**
9 United States Magistrate-Judge

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